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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, DENISE TUCKER, DONALD HALPERIN, Commissioner of the Division of Housing and Community Renewal of the State of New York, G. OLIVER KOPPELL, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Petitioners,

—against—

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a *et seq.*, the federal statute enacted to provide for the resolution of failed savings and loan institutions, authorizes the Resolution Trust Corporation to repudiate statutory tenancies in disregard of New York State's securities and rent regulatory laws.

LIST OF PARTIES

The following parties were appellees in the court below: Selma Diamond, Ira Kaufman, Jerome Lederer, Peggy Lehman, Susan Solomon Pattullo, Horace Solomon, Lillian Solomon, Denise Tucker, Lloyd Ribner, as Executor of the Estate of Muriel Ribner, deceased, the New York State Division of Housing and Community Renewal ("DHCR"), Angelo Aponte, as Commissioner of DHCR and Robert Abrams, as Attorney General of the State of New York.

Of these appellees, Susan Solomon Pattullo, Lloyd Ribner, Denise Tucker and DHCR are petitioners herein. G. Oliver Koppell, who succeeded appellee Robert Abrams as Attorney General of the State of New York on December 30, 1993, and Donald Halperin, who succeeded appellee Angelo Aponte as Commissioner of DHCR on October 25, 1993, are also petitioners herein, as both are automatically substituted as parties pursuant to Fed. R. Civ. P. Rule 25(d). Appellees Lillian Solomon, Selma Diamond, Ira Kaufman, Peggy Lehman and Horace Solomon are submitting a separate petition for a writ of certiorari. Appellee Jerome Lederer has died and his estate is not seeking review of the judgment below.

The appellant below, the Resolution Trust Corporation, as receiver for Nassau Savings and Loan Associations, F.S., is the respondent herein.

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Petitioners,

—against—

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this action on March 2, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 18 F.3d 111 (2d Cir. 1994) and is reprinted in

the appendix to the petition at A-1 to A-35.[1] The memorandum opinion of the United States District Court for the Southern District of New York (Carter, J.) is reported at 801 F. Supp. 1152 (S.D.N.Y. 1991) and is reprinted at A-36 to A-58.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1994. This petition is filed within ninety days of the court's opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The applicable statutes and regulations are reproduced in the appendix at A-62 to A-69. The relevant federal statutory provisions are found under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441 *et seq.* Of particular relevance are 12 U.S.C. §§ 1821(e)(1) and 1821(e)(5)(A).

12 U.S.C. § 1821(e)(1) provides that:

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any depository institution may disaffirm or repudiate any contract or lease:
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or

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[1] References to the petitioners' appendix are cited as "A__". The joint appendix in the court below is referred to as "JA-__".

receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(5)(A) provides that:

> If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—
>
> (i) treat the lease as terminated by such repudiation; or
>
> (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

The relevant New York statutory and regulatory provisions are the Emergency Housing Rent Control Law, L. 1946, c. 274 (codified at N.Y. Unconsol. Laws §§ 8581-8597 [McKinney 1987]); Admin. Code of the City of N.Y. §§ 26-401-415 (reported following N.Y. Unconsol. Law § 8617 [McKinney 1987] ("N.Y.C. Admin. Code"); N.Y.C. Admin Code §§ 26-501-520 (reported following N.Y. Unconsol. Law § 8617 [McKinney 1987]); 9 NYCRR 2520 *et seq.* (reported following N.Y. Unconsol. Laws § 8634 [McKinney 1987]); and N.Y. Gen. Bus. Law § 352 *et seq.*

STATEMENT OF THE CASE

Since 1946, New York has periodically enacted and extended a series of rent regulatory laws pursuant to its police powers to protect its citizens from eviction. The enactment of these laws has been based upon a finding that a housing emergency exists in certain areas of the State of New York. (N.Y.C. Admin. Code §§ 26-401, 26-501.)[2] This case involves

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[2] *See also Sobel v. Higgins*, 188 A.D.2d 286 (1st Dep't 1992), *appeal dismissed*, 81 N.Y.2d 953 (1993); McKinney's *Session Laws*, L. 1982, c. 555, Legislative Findings § 1.

a challenge to those laws by the Resolution Trust Corporation ("RTC"), the federal agency established to resolve the problems of failed savings and loan associations. RTC claims that its power, under 12 U.S.C. § 1821(e)(1), to "disaffirm or repudiate any contract or lease" to which a failed institution is a party and which it deems burdensome extends to contracts and leases which take effect pursuant to the historic emergency housing laws enacted by the states. It is the petitioners' position that Congress, in employing the terms "contract" and "lease", did not intend to authorize RTC's repudiation of such statutory tenancies.

A. New York's Rent Regulatory Scheme

New York has established two categories of rent protected tenancies: rent control and rent stabilization.[3] Under both systems of rent regulation, rental increases and continued occupancy are controlled by statute. *See, e.g.*, N.Y.C. Admin. Code § 26-405 (rent control); N.Y.C. Admin. Code § 26-511 (rent stabilization). As long as the legally prescribed rent is paid, tenants may not be evicted except for certain specified grounds. N.Y.C. Admin. Code § 26-408, reported following N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y.C. Admin. Code 26-511 and 9 NYCRR Part 2524.[4] Rent control does not require any lease agreement. *See, e.g.*, N.Y.C. Admin. Code § 26-408(a). Although rent stabilization uses leases as a vehicle to periodically increase rents, the absence of a lease does not affect the tenant's status as protected by the rent stabilization laws. *See, e.g.*, 9 NYCRR § 2522.5(b)(2).

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[3] This rent regulatory scheme is applicable mainly to New York City and its surrounding counties.

[4] Grounds for eviction under both rent control and rent stabilization include breach of a substantial obligation of the tenancy, commission of a nuisance, illegal occupancy, refusal to provide reasonable access, or occupancy in a premises undergoing an eviction-type cooperative conversion. In addition, there are procedures for terminating tenancies where an owner seeks occupancy of the premises by him- or herself, where the tenant is not using the premises as his or her primary residence, or where an owner seeks to demolish or alter the premises.

Rent control is based upon a finding that a "serious emergency continues to exist in the housing of a considerable number of persons in the city. . . ." N.Y.C. Admin. Code § 26-401. Rent stabilization was adopted in New York City in 1969 because of a similar finding that a "serious public emergency continues to exist. . . ." N.Y.C. Admin. Code § 26-501. In 1993 New York again declared an emergency in housing in certain parts of the State and readopted the rent regulation enabling laws (with some modification not relevant here) and extended them to June 15, 1997. McKinney's *Session Laws*, L. 1993, c. 253.

B. New York's Condominium Conversion Laws

New York has enacted a comprehensive set of laws which govern the conversion of residential rental properties to condominium ownership. N.Y. Gen. Bus. Law, art. 23-A, §§ 352-359-h (McKinney 1984). These laws, commonly referred to as the Martin Act, require, *inter alia*, that an offering plan disclosing all material facts be filed with the Attorney General of the State of New York prior to any public offer of a condominium unit for sale.[5] N.Y. Gen. Bus. Law § 352-e.[6]

In addition, for conversions in New York City and three suburban counties, the Martin Act sets forth certain rights for tenants. In particular, non-purchasing tenants under non-eviction type plans who are subject to rent control or rent stabilization remain so if they choose not to purchase their unit. N.Y. Gen. Bus. Law §§ 352-eeee(2)(c)(ii) and (iii), 352-eee(2)(c)(ii) and (iii). Those tenants not subject to rent regulation receive protection from eviction except for certain "fault" grounds and cannot have their rents unconscionably increased beyond those for ordinary rentals for comparable

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[5] These laws also regulate other types of real estate securities: cooperatives, homeowners associations, timeshares and real estate syndications.

[6] These provisions also proscribe fraud and fraudulent practices. N.Y. Gen. Bus. Law §§ 352, 352-c.

apartments. N.Y. Gen. Bus. Law §§ 352-eeee(2)(c)(iv), 352-eee(2)(c)(iv).

C. The Conversion Of The Premises

In May, 1982, the Attorney General accepted for filing an offering plan pursuant to the Martin Act to convert the 45-unit rental building at 444 East 57th Street, Manhattan to condominium ownership. (JA-209). Originally, non-purchasing tenants, except for eligible senior citizens or eligible disabled persons, could be evicted from their apartments three years after the plan was declared effective. N.Y. Gen. Bus. Law § 352-eeee(1)(f) and (g). In 1983, the tenants negotiated with the sponsor of the offering to amend the plan to a non-eviction type plan. Tenants were offered the right to purchase their units at a reduced purchase price or to remain as tenants as long as rent was paid and they otherwise did not default on the obligations of their tenancies, as determined by applicable rent control or rent stabilization laws and the Martin Act. (JA-209, 364-372). Petitioners Pattullo, Ribner[7] and Tucker are tenants residing at the premises who relied upon this promise not to be evicted and chose to remain as non-purchasing tenants. (JA-318-361, 475-478).

In early 1983, closings to units took place. (JA-210). Thereafter, the sponsor continued to own several of the units at the premises which were occupied by rent regulated tenants. Prospective purchasers of these occupied units were warned in the offering literature that the tenants were entitled to remain in possession pursuant to the requirements of the Martin Act. (JA-377).

In 1984, the sponsor pledged ten of its unsold occupied rent regulated units to Nassau Federal Savings and Loan Association ("Nassau Federal") as collateral for a loan of

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[7] Muriel Ribner is now deceased. She is represented by Lloyd Ribner, the executor of her estate.

$3,200,000. (JA-199). The loan was based on a valuation of the ten rent-regulated units as occupied by non-purchasing rent-regulated tenants.[8] In July, 1987, the sponsor of the offering defaulted on its loan and Nassau Federal commenced foreclosure proceedings. A foreclosure sale was held in March, 1989, at which time Nassau Federal, as the highest bidder, acquired title to the units. (JA-199-200). Upon acquisition of the units, Nassau Federal assumed the rights and obligations of the sponsor, as set forth by applicable rent control or rent stabilization provisions of state law, as well as the express terms of the offering plan. Among the applicable provisions of state law was the obligation of whomever took title to the units to allow non-purchasing tenants to remain in occupancy. (JA-199).

D. The Enactment Of FIRREA And RTC's Repudiation

In 1989, Congress enacted FIRREA in response to the growing savings and loan crisis. With the enactment of FIRREA, Congress created the RTC to recapitalize the savings deposit insurance system and to provide for the expeditious resolution of failed savings and loan institutions. Sen Rep. No. 101-19, 101st Cong., 1st Sess. at 3. In order to accomplish these goals, RTC was given the authority to operate a failed institution as a conservator, preserving its assets and property, 12 U.S.C. § 1821(d)(2)(D), or as a receiver, liquidating its assets. 12 U.S.C. § 1821(d)(2)(E).

Of relevance to this proceeding, RTC was authorized to "disaffirm or repudiate any contract or lease" to which the failed institution was a party if, in its discretion, it determines the contract or lease to be "burdensome" and if such disaffirmance or repudiation will, in its opinion, "promote the orderly administration of the institution's affairs." 12 U.S.C. § 1821(e)(1). In addition, the statute provides that where RTC repudiates such a lease, the lessee has the right to "remain in

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[8] The units had an aggregate cash purchase price as vacant of $7,746,400. (JA-210). One unit was later sold and is not at issue.

possession of the leasehold interest for the balance of the term of the lease." 12 U.S.C. § 1821 (e)(5)(A).

On or about March 16, 1990, RTC was appointed the receiver of Nassau Federal by the Office of Thrift Supervision ("OTS"). (JA-200). Title to the occupied rent regulated units at the premises was formally taken on March 20, 1990 by a new federal savings and loan association, Nassau Savings and Loan Association, F.A. ("Nassau Savings"), organized by RTC pursuant to 12 U.S.C. § 1821(d)(2)(F). (JA-200). When RTC took possession of Nassau Federal, it succeeded to the rights, titles and obligations of Nassau Federal, including the obligations with regard to nine rent-regulated, occupied apartments at 444 East 57th Street.[9] (JA-199).

On August 17, 1990, RTC wrote to the non-purchasing, rent-regulated tenants in the nine units it owned at the premises advising them that it intended to repudiate and disaffirm the leases to their apartments. Tenants were advised that, under 12 U.S.C. § 1821(e)(5)(A), they could either treat their leases as terminated and vacate immediately or remain in possession for the balance of the lease term.[10] Alternatively, tenants were offered the right to buy their units at 90% of the appraised vacant value. (JA-214, 249-266).

New York officials thereafter objected to RTC's repudiation of the tenancies. RTC Executive Director David Cooke was concerned about the legality of the attempted repudiation and this eventually led to a decision to suspend steps towards repudiation pending receipt of additional information, including an analysis of RTC's authority to repudiate, the number of units impacted by RTC's decision,[11] and whether any leases

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[9] There is no dispute that each of the nine units had been subject to either rent control or rent stabilization prior to the conversion of the premises to condominium ownership. (JA-77-78).

[10] In most cases, RTC deemed the lease terms to be ended as of September 30, 1990. (JA-249-266).

[11] According to RTC, by 1990 it estimated that it had 1,000 units in either cooperatives or condominiums under its control in the New York

could be terminated within the framework of local law. Thereafter, RTC staff again recommended repudiation, acknowledging the "precedent setting" nature of their action. (JA-269).

RTC then adopted an across-the-board policy of repudiation applicable to all residential units in New York subject to state or local rent and/or securities regulation. The Policy Statement (A-39), adopted by the RTC Board on February 22, 1991, provided that RTC could repudiate burdensome leases when the family income was 115% or more than the HUD median income level for the area.[12] On February 25, 1991, RTC wrote to the nine tenants to "confirm" RTC's repudiation of their statutory tenancies.

E. Proceedings Below

On February 25, 1991, RTC commenced an action in the United States District Court for the Southern District of New York for a declaration that it has authority, under FIRREA, to preempt New York law, repudiate the leases and tenancies for the nine rent-regulated units, evict the tenants without regard to state law and sell the units.[13] (JA-11-29). On March 11, 1991, the State commenced its own action in the Southern District seeking a declaration that RTC cannot evict statutory tenants residing in cooperatives and condominiums established under state law and pursuant to an offering plan, and

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and New Jersey area and that this number could increase to 2,200 should seventeen additional failed savings and loan institutions come under its control as scheduled. RTC acknowledged that it might have even additional units in New York held by institutions located outside the Northeast Region. In addition, RTC was aware that there were other units under its control or ownership in New York which were held by institutions located outside the region. RTC was also aware that its projections did not include units held by the Federal Deposit Insurance Company ("FDIC"). (JA-272).

[12] In December, 1993, RTC raised this ceiling to 130%.

[13] RTC invoked the jurisdiction of the federal district court pursuant to 12 U.S.C. § 1441a(a)(1).

seeking an injunction barring RTC from attempting to evict the tenants in violation of the rent regulatory laws of the State or otherwise interfering with their rights.[14] The State also sought to enjoin RTC from engaging in any acts involving the offer of real estate securities without first complying with the State's disclosure requirements under the Martin Act. (JA-62-91). On May 30, 1991, the district court (Carter, J.) consolidated the two actions and, on January 10, 1992, the plaintiffs in both actions moved for summary judgment.

By judgment entered November 10, 1992, the district court granted the State's motion for summary judgment and denied summary judgment to the RTC. (A-59-61). In its decision, the court looked to state law for the definition of "contract or lease". It determined that New York's statutory tenancies are not based on leases or contracts, but rather, that they exist by reason of New York's emergency rent laws. It rejected RTC's argument that New York's rent regulations and securities laws are preempted by FIRREA either expressly or because there is a conflict between federal and state laws. Therefore, the court held that the RTC had exceeded its authority under 12 U.S.C. § 1821(e) when it attempted to repudiate the tenancies in question. (A-36-58).

RTC appealed to the United States Court of Appeals for the Second Circuit. On March 2, 1994, the Second Circuit reversed the district court's holding that RTC could not repudiate New York's statutory tenancies. (A-1-35). The court held that the nine tenancies are grounded in a contract or lease, as defined by federal law, and thus fell within the express language of FIRREA. Even though it acknowledged that the tenancies "are tightly regulated and policed", and that the "core" terms of the landlord-tenant relationship which are "indispensable" to the creation of a tenancy—the duration, or "term", and the price or "rent"—are governed by New York's

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[14] The State invoked the jurisdiction of the federal district court pursuant to 12 U.S.C. § 1441a(a)(11), and 28 U.S.C. §§ 1331, 1346(a)(2) and 1361.

rent regulatory statutes, the court nevertheless determined that such regulation did not make them "non-contractual" in nature. (A-16,21).

The Second Circuit also rejected New York's alternative argument that, under 12 U.S.C. § 1821(e)(5), even if the tenancies are found to be lease-based, the tenants could remain in possession of their apartments for the duration of their statutory tenancies, *i.e.*, as long as they continued to pay rent, and not just for the period during which their rate of rent remained in effect. The court determined that even though, under state law, these tenancies continue upon each reauthorization of the state statutes, the "acute financial emergency" RTC was designed to aid mandated a shorter duration. It specified the times at which the tenancies ended as being either the next lease renewal date for rent stabilized-tenants or the biennial January 1st date when a rent controlled-tenant had his or her base rent reviewed.[15]

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted because of the importance of this issue, and because the Second Circuit's decision conflicts with relevant state and federal case law, with the presumption against preempting a state's exercise of its historic police powers and with the cooperative relationship which the federal government contemplates with state systems of housing.

The Second Circuit's decision in this case impermissibly sweeps away an important aspect of the historic balance between the powers of the federal government and the powers of the states—the right of states to exercise their emergency police powers to protect their citizens' homes. In reaching its decision that FIRREA expressly preempts New

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[15] On April 4, 1994, the Second Circuit stayed issuance of the court's mandate pending this Court's determination of the petitions for a writ of certiorari.

York's statutorily rent-regulated tenancies, the court has displaced almost fifty years of rent regulation in New York. In its decision, the Second Circuit held that the definition of the phrase "contract or lease" is a matter of federal law. While it acknowledged that it consulted state law for guidance concerning the design and operation of the rent regulation programs at issue, it effectively ignored the key body of state law on how the State of New York defines the tenancies in question.

As a result of this decision, New York's historic exercise of its emergency police powers in the area of housing is severely threatened, as are the thousands of innocent tenants who may lose their homes. In addition, tenants in other jurisdictions throughout the country where similarly enacted housing laws exist pursuant to these states' police powers are also threatened. More importantly, this decision signals to all the states that RTC can preempt state law in any and all fields, even those fields which have historically been left to the states to protect their citizenry.

A. The Second Circuit's Decision Conflicts With Relevant State And Federal Case Law

As noted previously, under § 1821(e)(1) of FIRREA, RTC may "disaffirm or repudiate any contract or lease" to which the institution is a party and which the RTC deems burdensome. Focusing on what it termed the "voluntary" nature of New York's rent-controlled and rent-stabilized tenancies, the Second Circuit concluded that FIRREA authorizes RTC to repudiate and disaffirm such tenancies. The court's decision is in direct conflict with the relevant New York cases and federal case law.

In New York, a tenant occupying a rent-controlled or rent-stabilized apartment does not have what can reasonably be defined as a mere contractual relationship with his or her landlord. While New York's statutory tenancies are commenced by a voluntary agreement in the sense that the landlord *originally* agreed to rent a unit to a particular tenant,

once the tenancy exists, the only remaining voluntary aspect of the relationship is that the tenant can leave at certain times and under certain terms. For the landlord, all aspects of the relationship are statutorily controlled, so long as the laws are in effect. Most significantly, rent and duration, the two critical elements that the circuit court viewed as the "core" aspects of a tenancy and which are "indispensable to the creation of the tenancy" (A-16), are controlled by statute. While the landlord-tenant relationship may have commenced by agreement, after the initial "coming-together" of the parties, the rent control statutes take over and define the tenancy.[16]

Indeed, both state and federal courts have consistently held that rent-controlled and rent-stabilized tenants are not "contractual" tenants, but are, rather, "statutory" tenants. New York's highest court addressed this issue in *Whitmarsh v. Farnell*, 298 N.Y. 336 (1949). There, a landlord sought to evict a tenant with whom he had voluntarily entered into a lease agreement. The New York Court of Appeals held that since the lease was thereafter governed by New York's rent control statute, the tenant's "occupancy of the apartment after his lease expired was not under any agreement express or implied but by virtue of a compulsion exerted on the landlord by the local emergency rent law which allowed him to remain in possession." *Id.* at 343. *See also Stern v. The Equitable Company Trust of New York*, 238 N.Y. 267 (1924); *De Santis v. White Rose Associates*, 152 Misc.2d 567 (Sup. Ct. N.Y. Co. 1991) (rent-stabilized tenancies are not terminated upon foreclosure); *Park Summit Realty Corp. v. Frank*, 107 Misc.2d 318, 323 (App. T. 1st Dep't 1980), *aff'd*, 84 A.D.2d 700 (1st Dep't

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[16] The circuit court's decision, however, essentially places New York's rent regulation on the same level as a contract for computer equipment leasing (*Unisys Financing Corp. v. Resolution Trust Corp.*, 979 F.2d 609 [7th Cir. 1992]) or bank office leases (*RTC v. CedarMinn Bldg. Ltd. Partnership*, 956 F. 2d 1446 [8th Cir.], *cert. denied sub nom CedarMinn Bldg. Ltd. Partnership v. RTC*, 113 S. Ct. 94 [1992]).

1981), *aff'd*, 56 N.Y.2d 1025 (1982); *Charlotte Realty Co. v. Lubarsky*, 133 Misc.2d 785 (App. T. 2d & 11th Dist. 1986).[17]

Similarly, in *In re Friarton Estates*, 65 B.R. 586 (S.D.N.Y. 1986), the Bankruptcy Court held that a trustee in bankruptcy may not remove rent-controlled tenants from apartments owned by the debtor. In so ruling, the court, relying on *Whitmarsh v. Farnell*, 298 N.Y. 336, specifically held that "the occupancy of a statutory tenant is not under any agreement, express or implied, but by virtue of the compulsion exerted on the landlord by local emergency rent laws. . . ." *Id.* at 592. *See also Matter of Chicago, Rock Island and Pacific Railroad Co.*, 772 F.2d 299 (7th Cir. 1985), *cert. denied sub nom Kent v. Sanborn Cooperative Grain Co.*, 475 U.S. 1047 (1986) (rejecting trustee's argument that application of Iowa rent control law was preempted by the Bankruptcy Law).[18]

The Second Circuit not only failed to apply these cases correctly to the statutory language of FIRREA, but it also erroneously ignored the fact that RTC did not demonstrate

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[17] Although the circuit court claimed to "defer to state court pronouncements regarding the definition of property rights" in reaching its analysis, the court, in fact, chose to rely on the State's general body of property law and totally disregarded the body of New York law which addresses the specific property rights involved in this case, thus ignoring the entire body of New York law which defines rent-regulated tenancies. Moreover, the cases cited by the circuit court do not even hold that these tenancies are non-statutory in nature. Rather, they simply state that certain contractual terms continue to govern the landlord-tenant relationship even after the lease expires.

[18] In its decision, the Second Circuit pointed out that the Bankruptcy Code expressly permits a tenant to continue in his or her occupancy if the tenant is otherwise allowed to do so under a non-bankruptcy law such as New York's rent control law. In suggesting that this was the sole basis for the *Friarton* court's determination, the Circuit ignored the Bankruptcy Court's emphasis on the non-contractual nature of a rent controlled tenancy as well as the Bankruptcy Court's reference to the Seventh Circuit's *Rock Island* case and to the fact that compliance there with the state rent control law "might frustrate federal policy designed to maximize the selling price of a bankrupt railroad's assets." 65 B.R. at 591.

the legislative history of FIRREA, that the phrase "contract or lease" was to be applied to include individual rights provided by state statute. In fact, the Fifth Circuit, contrary to the Second Circuit's ruling in this case, has ruled that individual rights provided by state law are not preempted by regulations issued pursuant to FIRREA. In *Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1990), the Fifth Circuit held that provisions of FIRREA which imposed conditions on the validity of agreements against the interests of the FDIC did not preclude a maker of a note secured by a deed of trust from asserting her homestead claim under Texas law. In doing so, the court found that a person's right to the State's homestead exemption, analogous to the right of a non-purchasing tenant here to remain in occupancy, "exists independently of any agreements between the parties." *Id.* at 543. (citation omitted).

In *Patterson*, the fifth Circuit applied the three-factor test of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979), and "decline[d] to establish federal common law that would abrogate the well-established Texas law . . . protecting citizens' homesteads." 918 F.2d at 544. The court relied principally on "the disruption of state commercial relationships"; *id.* at *544*, that would occur if it were to abrogate citizens' well-established right under Texas law not to be forced from their homesteads. Citizens of New York, like citizens of Texas, have a well-established right under the State's rent control and rent stabilization laws not to be evicted from their apartments. Because the Fifth Circuit's *Kimbell Foods* analysis applies with equal force to this case, its decision in *Patterson* conflicts with the Second Circuit's analysis.

Here too, the rights of the affected tenants to occupy their apartments are grounded in state law. The character and essential terms of their tenancies are found not through any contractual agreement with their landlord but, rather, through state statutory provisions governing residential apartments in New York City. The Second Circuit's contrary conclusion misreads FIRREA and conflicts with applicable state and federal law.

In addition, the circuit misapplied the FIRREA provision which gives tenants the right to remain in their apartments for the full term of their leasehold. 12 U.S.C. § 1821(e)(5)(A)(ii). Under New York law, the term or duration of a rent-controlled tenancy lasts for "so long as [the tenant] continues to pay the rent." N.Y.C. Admin. Code § 26-408 (reported following N.Y. Unconsol. Law § 8617 [McKinney 1987]) (governing rent-controlled tenants). *See also* 9 NYCRR 2524.1(a) (similar provision governing rent-stabilized tenants); *130 West 57th Corp. v. Hyman*, 66 N.Y.S.2d 332, 334 (App.T. 1st Dept. 1946) ("so long as a tenant continues to pay the rent to which the landlord is entitled he may not be removed from the premises"). The Second Circuit nevertheless ruled that a rent-regulated tenancy may, for purposes of FIRREA implementation, be divided into discrete terms which periodically end at the time a landlord is entitled to a review of the maximum base rent he or she is allowed to charge. This delineation of a tenancy term under rent control is artificial and contrary to the letter and spirit of state law.

B. The Circuit's Decision Is Inconsistent With The Strong Presumption Against Preempting A State From Exercising Its Historic Police Powers, and Ignores The Cooperative Relationship Which The Federal Government Seeks To Maintain With State Systems of Housing

A strong presumption exists against preempting a state from exercising its historic police powers. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992). Absent explicit authority to override such powers, RTC should not be permitted to disaffirm the tenancies in question.

In ruling that New York's rent control and rent stabilization laws may be preempted by RTC fiat, the Second Circuit ignored this presumption. In addition, the court ignored the fact that the federal government generally seeks to maintain a cooperative relationship with state systems of housing. *Kargman v. Sullivan*, 552 F.2d 2 (1st Cir. 1977); *Rowe v.*

Pierce, 622 F. Supp. 1030, 1033 (D.D.C. 1985). The area of landlord/tenant law at issue here is an area traditionally left to the states. *Id.*

Indeed, it is well-established that "[c]oncepts of real property are deeply rooted in state traditions, customs, habits and laws." *RFC v. County of Beaver*, 328 U.S. 204, 210 (1946). When intruding upon "relationships traditionally governed by state law. . .", this Court has found that the need for uniformity under federal law can be "outweighed by the severe dislocation to local property relationships. . . ." *United States v. Brosnan*, 363 U.S. 237, 240-242 (1960).

Here, New York's rent control laws have been in effect, in various forms, for more than fifty years. They are an integral part of the fabric of life in New York City and provide hundreds of thousands of city residents with the security of knowing that they are protected from eviction. The circuit's decision has significantly undermined this sense of security.[19]

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[19] A case is presently pending before this Court which raises the issue of whether, under FIRREA, it is state or federal law which defines the rights of RTC and FDIC as receivers of an insured depository institution. *O'Melveny & Meyers v. FDIC*, *cert. granted*, 114 S.Ct. 543 (1993) (No. 93-489). Should the Court hold, in *O'Melveny*, that it is state law which is applicable, it is respectfully submitted that, given the fact that the Second Circuit below defined the phrase "contract or lease" as a matter of federal law, the petition herein be granted, the judgment below vacated and the case remanded for reconsideration. *See Lane v. Smith*, 457, U.S. 1102 (1982); *Eckerd Drugs, Inc. v. Brown*, 457 U.S. 128 (1982).

CONCLUSION

For the reasons stated above, this petition for a writ for certiorari should be granted.

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